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NO. 92-6591

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF FOR
THE UNITED STATES IN OPPOSITION



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1188

OPINIONS BELOW

The opinion of the Court of Appeals is reported in United States vs. Sherrod, 964 F.2d 1501 (5th Cir. 1992). The unpublished denial of Defendant-Petitioner's Petition for Rehearing was filed on August 3, 1992.

JURISDICTION

The Court of Appeals Opinion filed its opinion in this matter on June 23, 1992. Defendant-Petitioner, Jerry Wayne Sewell, Sr. filed timely Petition for Rehearing on July 6, 1992. The court of appeals denied the Petition for Rehearing on August 3, 1992. The Court's jurisdiction is invoked under the following statutes and Rule 10 of the Supreme Court:

(1) Title 28, U.S.C. Section 125(1);

(2) The decision of the Fifth Circuit Court of Appeals conflicts with the decisions of other United States Court of Appeals on the same matter, to wit:

A. United States vs. Rolande-Gabriel, 938 F.2d 129 (6th Cir. 1991), and United States vs. Acosta, 963 F.2d 551 (2nd Cir. May 1992), which hold that the term "mixture" used in the United States Sentencing Guidelines, Section 2D1.1 does not include unusable waste mixtures of controlled substances.

B. United States vs. Perrone, 936 F.2d 1403 (2nd Cir. 1991), and United States vs. DeNoia, 451 F.2d 979 (2nd Cir. 1991), which hold that where the acts of a Defendant in a narcotics conspiracy case are minimal, there must be independent evidence tending to prove the Defendant had some knowledge of the broader conspiracy.

(3) The Fifth Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court and conflicts with the rationale of the decision of this Court in Chapman vs. United States, 500

U.S. _____, 111 S.Ct. 1919 (1991).

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

Petition, Jerry Wayne Sewell, Sr., feels compelled to note some errors in the Government's Brief in Opposition to his Petition for Writ of Certiorari.

I.

The Government continues to misstate the facts or to state, as fact, things from the record which are, at best, conflicting. For example, at page 4, the Government contends that DEA agent, Milton Shoquist took "exact measurements" of the baking pan at the bus laboratory before the pan was destroyed. Further, in the final paragraph on that page the Government attempts to portray the measurements as "detailed measurements." The contentions of the Government cannot be supported by the record at trial. Attached as Exhibit 1 are copies of three pages of the transcript of the testimony of DEA agent, Milton Shoquist concerning "the exact measurements" of the pan in question. At page 110, lines 19 and 20, Mr. Shoquist testifies that the pan in question was "8 inches wide, measured from the inside, 16 inches long, and then it was 16 inches deep." However, on page 130, at lines 19 and 20, Mr. Shoquist, again referring to the same pan, stated "it came from the 8 X 16 X 6 stainless steel serving tray." Mr. Shoquist never testified concerning any device used to obtain "exact" or "detailed" measurements. Further, Mr. Shoquist contradicts himself regarding the outcome of the "exact" and "detailed" measurements.

The Government blithely ignores the contradictory testimony of Mr. Shoquist, as well as the fact that the actual coke canister found at the laboratory was never measured except by proxy when "a similar" canister was measured just prior to trial. Additionally, the mason jar was never measured in any fashion to determine the quantity of material that it would, or in fact did, hold. In spite of all this, the Government continues to insist that the amounts of drugs with which the Defendants were charged in this case were ascertainable to a very exacting degree. The record reflects otherwise and clearly illustrates the attempt of the Government to characterize the record in a misleading manner.

Without hesitation, however, the Government relies heavily on a statement of the Court of Appeals that "on-site estimates WERE NOT BASED ON ANY ACCURATE MEASUREMENTS MADE ON AT THE SCENE, but were conservative guesses of the amounts of the mixtures" that had later been credibly shown by the Government's trial evidence to be significantly understated. Page 6, Government's Brief in Opposition [emphasis added]. On the one hand, the Government argues that measurements of the container were taken and were accurate. On the other hand, the Government argues that the *estimates* of the contents of those same containers can be relied upon to be "conservative" estimates, and that the actual quantity contained was much more.

This is but one illustration of the Government's erroneous characterization of the facts that occur in this case.

II.

The Government continues to insist that the issue of Petitioner, Jerry Wayne Sewell, Sr.'s prior convictions was not properly raised at the appellate level when it was squarely before the court of appeals long before the decision was rendered. The events surrounding Petitioner's prior convictions were detailed at length Petitioner's reply to the Government's Brief in Response to the Petitioner's appeal. The detailed outline on the issue of the prior convictions was mailed to all counsel of record as well as the court of appeals on February 3, 1992. The decision of the court of appeals was rendered June 23, 1992. The court of appeals had before it, for approximately four months, a detailed statement of the Petitioner's arguments concerning his prior convictions. At foot note 5, page 13 of the Government's Brief in Opposition, the Government relies on the court of appeals mistaken assumption that the issue of the Petitioner's prior convictions were raised first in a Motion for Rehearing to support the Government's argument that the issue should not be reconsidered here. The court of appeals' failure to recognize that the issue of prior convictions had been raised prior to the original decision and not in the Petition for


Rehearing illustrates that the Petitioner in this case failed to receive the required *de novo* review of his sentence.

CONCLUSION

For the reasons set forth in Jerry Wayne Sewell, Sr.'s Petition for Writ of Certiorari in addition to those set out above, this Honorable Court should grant the Petition for Writ of Certiorari to issue and review the judgment and opinion of the Fifth Circuit Court of Appeals in this matter.

Respectfully submitted,

ADAMS, COFFEY & DUESLER, L.L.P.


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I N D E X

GOVERNMENT'S EVIDENCE:

JOHN FRYAR	
CROSS - CICHOWSKI (CONT'D.)	3 - 25
REDIRECT - JENKINS	25 - 40
RECROSS - ROEBUCK	41 - 64
RECROSS - LATINO	64 - 73
MILTON SHOQUIST	
DIRECT - JENKINS	74 - 120
VOIR DIRE - ROEBUCK	120 - 123
DIRECT - JENKINS (RESUMED)	123 - 139
VOIR DIRE - ROEBUCK	139 - 147
DIRECT - JENKINS (RESUMED)	147 - 155
CROSS - ROEBUCK	155 - 170
CROSS - LATINO	170 - 172
CROSS - KONIUSZY	172 - 191

E X H I B I T S

GOVERNMENT'S EXHIBIT NOS.

ADMITTED

1	153
2	153
3	83
4	101
17	146
18	123
19	123
20	123
21	123
22	123
23	123
24	123
25	123
26	123
27	123
28	123
38-B	149
39-B	149
60-A	153
81	155

1 LIQUID THROUGH AND LEAVE YOUR POWDER ON TOP, OR THE QUANTITY
2 THAT YOU'RE GOING TO DEAL WITH.

3 MR. ROEBUCK: BEFORE WE GO ON, MAY I TAKE A CLOSER
4 LOOK?

5 MR. JENKINS: GO AHEAD.
6 MR. JENKINS:

7 Q OKAY. NOW, WAS THIS SPACE HEATER ON OR OFF?

8 A NO, SIR, IT WAS TURNED OFF.

9 Q AND COULD YOU EXPLAIN TO THE JURY WHAT THIS PAN APPEARS
10 TO BE?

11 A IT'S THE ONE THAT I DESCRIBED EARLIER AS THE FOOD PAN, OR
12 THE TYPE THAT YOU FIND IN RESTAURANTS, BUFFETS. IT'S JUST A
13 STAINLESS STEEL, OR A RUST-PROOF PAN, WITH A MIXTURE OF
14 CHEMICALS, INCLUDING CHOPPED UP ALUMINUM FOIL THAT WAS IN A
15 STAGE OF REACTION, IN MY OPINION.

16 Q OKAY. DID YOU MEASURE THIS PARTICULAR PAN?

17 A YES, SIR, I DID.

18 Q AND WHAT WERE THE DIMENSIONS OF THIS PAN?

19 A IT WAS EIGHT INCHES WIDE, MEASURED FROM THE INSIDE,
20 SIXTEEN INCHES LONG, AND THEN IT WAS SIXTEEN INCHES DEEP.

21 Q AND BASED ON THIS, HOW FULL WOULD YOU ESTIMATE IT TO HAVE
22 BEEN?

23 A I GUESSED THAT IT WAS HALF FULL, OR ESTIMATED THAT IT WAS
24 HALF FULL, AT THE TIME WE SEIZED THE LAB.

25 Q OKAY. DID YOU TAKE A SAMPLE OF THIS SUBSTANCE FROM THE

1 WHERE THE PASSENGERS WOULD ENTER IF THAT WAS STILL A BUS.

2 Q WE HAD ONE OF THESE OUT OF ORDER. NOW, THIS IS
3 GOVERNMENT'S EXHIBIT NO. 3 AND YOUR EXHIBIT NO. 4. CAN YOU
4 IDENTIFY THAT?

5 A YES, SIR. THIS IS THE ONE THAT CAME OUT OF THE STAINLESS
6 STEEL SERVING TRAY THAT WAS SITTING ON A SPACE HEATER.

7 Q OKAY.

8 MR. ROEBUCK: YOUR HONOR, I THINK I'M LOST.
9 GOVERNMENT'S 9 WAS WHAT?

10 MR. JENKINS:

11 Q WHAT IS GOVERNMENT'S EXHIBIT NO. 9?

12 A IT'S A SAMPLE THAT CAME OUT OF THE STAINLESS STEEL
13 PRESSURIZED -- I CALL IT A COKE CANISTER -- A SOFT DRINK
14 DISPENSER.

15 Q AND THAT'S YOUR EXHIBIT NO. 5?

16 A YES, SIR.

17 Q AND GOVERNMENT'S EXHIBIT NO. 8 AND YOUR EXHIBIT NO. 4
18 CAME FROM WHERE?

19 A IT CAME FROM THE 8 BY 16 BY 6 STAINLESS STEEL SERVING
20 TRAY.

21 Q BY THE WAY, REGARDING THE COKE CANISTER, HAVE YOU SINCE
22 HAD AN OPPORTUNITY TO OBTAIN A LIKE COKE CANISTER?

23 A YES, SIR, I HAVE.

24 Q AND WHERE DID YOU OBTAIN THAT?

25 A AT THE COCA-COLA BOTTLING COMPANY, HERE IN BEAUMONT.

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PROOF OF SERVICE

I, Kent M. Adams, do swear or declare that on the 2nd day of February, 1993, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid.

The names and addresses of those served are as follows:

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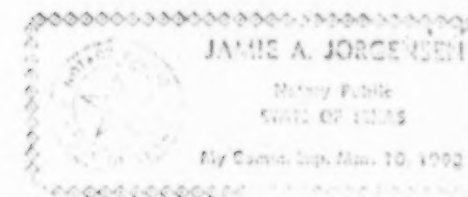
Dewey Gonsoulin

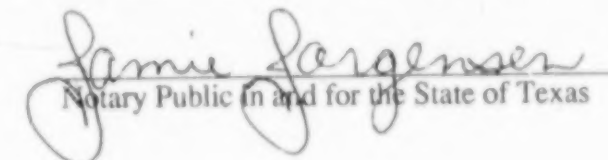
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Signature

STATE OF TEXAS
COUNTY OF JEFFERSON

Subscribed and sworn to before me on the 2nd day of February, 1993.




Notary Public in and for the State of Texas